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No. 94-1411

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC.,
Petitioner,

v.

TRAVELERS INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In view of Louisiana partnership law and the clear mandate of the doctrine of *res judicata,* about which the courts of appeal are not in conflict, whether *res judicata* bars a judgment creditor from asserting a subsequent collection suit against the general partner of a Louisiana partnership for payment of a judgment owed by the partnership.

STATEMENT UNDER RULE 29.1

In accordance with Rule 29.1 of the Supreme Court, respondent, The Travelers Insurance Company, advises that its parent, The Travelers Corporation, has issued shares of common and preferred stock to the public. Respondent further advises that it has no subsidiaries whose stock is publicly traded.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Travelers Insurance Company ("Travelers" or "Respondent"), through its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari submitted by petitioner, St. Jude Hospital of Kenner, La., Inc. ("St. Jude Hospital" or "Petitioner").

STATEMENT OF JURISDICTION

28 U.S.C. §1254(1) confers jurisdiction on this Court. The jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked pursuant to 28 U.S.C. §1291. The jurisdiction of the United States District Court for the Eastern District of Louisiana was invoked under 28 U.S.C. §1332(a)(1).

STATUTORY PROVISIONS INVOLVED

This petition involves issues of Louisiana partnership law and requires interpretation of two Louisiana codal provisions, article 737 of the Louisiana Code of Civil Procedure and article 2817 of the Louisiana Civil Code; both are included in Respondent's appendix.

STATEMENT OF THE CASE

A. Factual Background

This is a collection suit brought to compel a general partner to pay the debts of its limited partnership.

St. Jude Hospital was founded by John and Robert Liljeberg to develop an acute care hospital in Kenner, Louisiana in 1983. Needing to provide office space for the hospital physicians, St. Jude Hospital formed a Louisiana limited partnership, the St. Jude Medical Office Building Limited Partnership (the "Partnership"), and donated property adjacent to the hospital to the Partnership for the construction of the St. Jude Medical Office Building (the "MOB"). In consideration of that transfer, St. Jude Hospital was named the Partnership's sole general partner.

In 1985, Travelers loaned the Partnership $25,000,000. Of that loan amount, approximately $19,000,000 was

used to pay the construction lender and the balance of $6,000,000 was retained by the Partnership. To secure the debt, the Partnership granted a real and chattel mortgage that encumbered the MOB, its improvements (including tenant improvements), and all "corporeal movables"—personal property of any type owned by the Partnership and located at the MOB. The Partnership also granted to Travelers an assignment of all of the Partnership's rights under any leases of space in the MOB. Included among the assigned leases were two with affiliates of St. Jude Hospital – Liljeberg Enterprises ("LEI") and Krown Drugs, Inc. ("Krown").

During the next five years, the Partnership used Travelers' funds to make loans to its affiliates, LEI and Krown, and its insiders, the Liljebergs, and to pay a portion of the interest owed to Travelers. Although the Partnership repeatedly represented to Travelers that it timely collected all rents, the Partnership permitted Krown and LEI to avoid payment of rent owed under the leases assigned to Travelers. By early 1990, the Partnership had exhausted the funds loaned by Travelers, and the Partnership quickly defaulted in repayment of the loan. Travelers demanded payment of the loan. The Partnership, St. Jude Hospital and the Liljebergs responded with threats to render the MOB uninhabitable by terminating water service and blocking its sewerage and storm drainage system, which ran under neighboring property owned by St. Jude Hospital. When Travelers indicated that it would pursue foreclosure, the Partnership, Liljebergs and LEI responded by stripping tenant improvements from the MOB.

B. The Partnership Litigation

Faced with the destruction of its collateral and the Partnership's refusal to cure its default, Travelers instituted a diversity action in the United States District Court for the Eastern District of Louisiana against the Partnership, St. Jude Hospital, LEI, Krown, and the Liljebergs (the "Partnership Litigation"). Travelers' suit arose from five discrete sets of operative facts; only three of these involved St. Jude Hospital, against whom Travelers sought a judgment of primary, individual liability. Travelers did not seek a judgment against St. Jude Hospital based on its status as general partner of the Partnership.

The first set of operative facts underlying Travelers' Claims concerned the Partnership's March 1990 default of the promissory note executed in favor of Travelers in October of 1985 and secured by the real and chattel mortgage executed by the Partnership. The second set of operative facts related to Travelers' exercise of its rights under the leases between the Partnership and its affiliates that had been assigned to Travelers. The third set of operative facts referenced the Liljebergs' threats to terminate water and sewerage service to the MOB in the spring of 1990. The fourth set of operative facts arose from the removal of furniture, fixtures and equipment from the MOB in late May, 1990. The final transaction involved environmental damage to the real estate encumbered by Travelers' mortgage.

While some of the transactions involved the same parties, they were not otherwise related in time or substance.[1] Travelers named St. Jude Hospital as a party

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[1] **Accordingly, because the transactions did not arise out of the same facts, Travelers could have instituted five separate suits.**

[footnote continued]

concerning claims involving the third, fourth and fifth transactions. These claims arose solely from St. Jude Hospital's actions performed in its individual capacity and for which it was primarily liable.

In its second amended and restated complaint in the Partnership Litigation, Travelers named St. Jude Hospital as a defendant in nine counts.[2] First, Travelers requested an injunction against St. Jude Hospital and other defendants to prevent their blocking the water and sewerage pipes running under St. Jude Hospital's property.[3] Second, Travelers asserted that St. Jude Hospital, as owner of the property adjacent to the MOB, was obligated to grant a servitude for water and sewerage running from the MOB across St. Jude Hospital's property to the public main.[4] Third, Travelers charged St. Jude Hospital and the other defendants with negligent or intentional misrepresentation for failing to advise Travelers that a servitude had never been recorded properly.[5] Fourth, Travelers asserted that St. Jude

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Instead, for purposes of judicial economy and pursuant to Federal Rules of Civil Procedure 18(a) and 20(a), Travelers asserted in one suit all of its claims based upon those five transactions.

[2]The second amended complaint superseded both the restated and original and first amended complaint. Like the second amended complaint, those complaints neither asserted any claim against St. Jude Hospital relating to rent due from LEI or Krown nor asserted any claim seeking to hold St. Jude Hospital secondarily liable for the Partnership's debts.

[3]Count Two, second amended complaint. A copy of the second amended complaint is attached as Exhibit 1 to the record excerpts filed by Travelers with the court of appeals and lodged with the Clerk of the Supreme Court.

[4]Count Three, second amended complaint (Travelers' record excerpts, Exhibit 1).

[5]Count Four, second amended complaint (Travelers' record excerpts, Exhibit 1).

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Hospital and the other defendants breached their duty of good faith by failing to grant Travelers the water and sewerage servitude.[6] Fifth, Travelers requested that the trial court compel St. Jude Hospital and other defendants to grant the servitude in order to cure any deficiency in Travelers' mortgage.[7] Sixth, Travelers requested an injunction against St. Jude Hospital and other defendants to prevent removal of various furniture, fixtures and equipment from the MOB.[8] Seventh, Travelers alleged that St. Jude Hospital and other defendants were liable for damages resulting from the removal of the items from the MOB.[9] Eighth, Travelers asserted that St. Jude Hospital and the other defendants acted jointly to impair Travelers' collateral by denying the servitude and participating in the removal of furniture, fixtures and equipment from the MOB and that they should be held liable for payment of the debt secured by the collateral.[10] Finally, Travelers asserted that St. Jude Hospital and other defendants should pay to repair environmental damage to the MOB; St. Judge Hospital was joined in this count because the source of the damage, a leaky diesel fuel tank, was located on property owned by St. Jude Hospital.[11]

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[6]Count Five, second amended complaint (Travelers' record excerpts, Exhibit 1).

[7]Count Six, second aamended complaint (Travelers' record excerpts, Exhibit 1).

[8]Count Eight, second amended complaint (Travelers' record excerpts, Exhibit 1).

[9]Count Ten, second amended complaint (Travelers' record excerpts, Exhibit 1).

[10]Count Eleven, second amended complaint (Travelers' record excerpts, Exhibit 1).

[11]Count Twelve, second amended complaint (Travelers' record excerpts, Exhibit 1).

Travelers brought all of its claims against St. Judge Hospital in its primary, individual capacity. The claims arose out of either St. Jude Hospital's ownership of the property adjacent to the MOB or its participation in the removal of furniture, fixtures and equipment from the MOB. Travelers mentioned in the second amended complaint St. Jude Hospital's status as the general partner of the Partnership only to illustrate the relationship between the defendants and to show that the defendants were under common control; Travelers made no reference to St. Jude Hospital's secondary liability for the debts of the Partnership. Petitioner's status as a general partner did not serve as a foundation for recovery under any cause of action.

The exhaustive pretrial order in the Partnership Litigation did not address the issue of St. Jude Hospital's secondary liability for the debts of the Partnership. The pretrial order in the Partnership Litigation consisted of several hundred pages.[12] The parties jointly listed one hundred-sixty seven (167) contested issues of fact and sixty-three (63) contested issues of law. Of the contested issues of fact, only ten (10) related to St. Jude Hospital. Each of these concerned whether St. Jude Hospital damaged Travelers by denying use of the servitude or by participating in the removal of furniture, fixtures and equipment from the MOB.[13] Nowhere in the pretrial

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[12] Pretrial order attached as Exhibit "A" to Travelers' reply memorandum filed with trial court. A copy of the pertinent portions of the pretrial order is attached as Exhibit 2 to the record excerpts filed by Travelers with the court of appeals and lodged with the Clerk of the Supreme Court.

[13] Pretrial order, ¶s 2, 7, 12, 17, 22, 27, 32, 41, 121, and 165.

order did Travelers seek to hold St. Jude Hospital secondarily liable for the Partnership's debts.

At the close of Travelers' case, the trial court determined that there was insufficient evidence that St. Jude Hospital had participated in the removal of items from the MOB and that its property was encumbered by a servitude and granted judgment as a matter of law in favor of Petitioner as to those claims. Consequently, the interrogatories ultimately submitted to the jury contained no questions regarding St. Jude Hospital's liability under any theory.[14] Travelers' case against the other defendants then went to the jury, which awarded a multimillion dollar verdict in Travelers' favor. The court of appeals affirmed the judgment in favor of Travelers other than to hold that Travelers was entitled to an additional award of attorneys' fees.

C. The Hospital Litigation

1. The district court proceedings

Efforts to collect from the Partnership proved fruitless. On January 15, 1993, Travelers sued St. Jude Hospital, seeking payment of the judgment against the Partnership in the Partnership Litigation (the "Hospital Litigation").[15]

Both Travelers and St. Jude Hospital moved for summary judgment. Travelers based its motion upon

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[14] Indeed, both Travelers and St. Jude Hospital understood that Petitioners' secondary liability was not at issue: Neither party submitted proposed jury interrogatories or jury charges relating to Petitioner's secondary liability.

[15] As the lone general partner of the Partnership, St. Jude Hospital was solely responsible for the debt of the Partnership.

established Louisiana law requiring a general partner to pay the debts of its partnership; conversely, St. Jude Hospital alleged that *res judicata* had extinguished Travelers' claim. Specifically, St. Jude Hospital claimed that the doctrine required Travelers to assert in the Partnership Litigation all of its claims against St. Jude Hospital, including any secondary claim for payment of the Partnership's debts.

On May 18, 1993, the district court granted summary judgment in favor of Travelers and denied St. Jude Hospital's motion for summary judgment, holding the *res judicata* argument to be without merit.[16] The court concluded that *res judicata* did not apply to Travelers' suit:

> This Court concludes that the claim of Travelers against SJH [the St. Jude Hospital] to enforce against SJH the judgment debt of the Partnership is not barred by *res judicata.* The principal test for comparing causes of action is drawn from §24 of the Restatement of Judgments 2d, which provides that:
>
> > . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983). Travelers' rights against SJH arose only when Travelers obtained judgment against the Partnership and the Partnership, in turn, was unable

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[16] Petitioner's Appendix, pp. 9a-14a. (hereinafter, "P.App.").

> to pay the judgment. The "transactional test" set forth in *Nilsen*, therefore, does not preclude Travelers' claim against SJH.

P.App. 12a. The district court further concluded that St. Jude Hospital's presence as a defendant in the Partnership Litigation did not affect Travelers' right to pursue St. Jude Hospital for a claim based on secondary liability. The Court stated in that vein:

> SJH's presence as a party in the litigation against the Partnership, however, does not change the secondary nature of the claim asserted herein by Travelers. The jury that found the Partnership liable to Travelers was not asked to decide whether SJH would be liable to Travelers, whether primarily or secondarily, for that same debt based on its status as general partner of the Partnership. That SJH was not made a part of the judgment in the initial litigation does not relieve it of its obligations as partner. That matter was not before the jury and is not now precluded.

P.App. 12a.

St. Jude Hospital sought reconsideration of the district court's ruling on the *res judiciata* issue. On July 21, 1993, Judge Mentz denied St. Jude Hospital's motion for reconsideration:

> The Court by its May 18th order rejected [the *res judicata*] argument, and by this ruling does so again. SJH has evidently missed the point . . . These arguments have been considered and reconsidered by this Court for the last time.

P.App. 16a, 19a.

The district court discussed in detail that the Partnership Litigation arose out of different operative facts than those at issue in the Hospital Litigation. The court reasoned as follows:

> Thus far allusive [*sic*] to SJH is the point which defeats SJH's argument: SJH may have been a party to and an active participant in both the instant case and the previous lawsuit, but the nucleus of operative facts, the common core of facts, are entirely different for each case.
>
> In the previous lawsuit, the thrust was who *did* or *failed to* do what. As stated by SJH at page 9 of its Consolidated Memorandum,
>
> > The 1990 suit was filed against SJH as the sole general partner of [the Partnership] and was based on intentional and negligent acts and omissions concerning among other claims, breach of contract to provide a servitude, the failure to collect rental payments, and actionable waste.
>
> Clearly, the previous lawsuit sounds in tort, totally unlike the instant one which, no matter how it is dressed up, is fundamentally a collection suit. The issues and the facts in the present case have as their core who *owns* what, who possessed it and when.

P.App. 17a (italics in original) (footnote omitted).

Additionally, the district court explained that St. Jude Hospital's presence in the Partnership Litigation did not support Petitioner's *res judicata* argument, stating

> neither the Court nor the jury [in the Partnership Litigation] decided implicitly or explicitly that a party dismissed from primary liability for damages arising out of tortious acts and omissions was at the same time relieved of a legal obligation to pay a debt derived from its relationship as general partner to the debtor partnership.

P.App. 18a (footnote omitted). Subsequently, on July 30, 1993, the district court entered judgment in favor of Travelers and against St. Jude Hospital holding it liable

for payment of the Partnership's debt to Travelers. P.App. 20a-21a, 22a-23a. The district court denied St. Jude Hospital's motion for a new trial, alteration and amendment of judgment, and vacation of judgment. P.App. 24a-33a. Petitioner then appealed to the United States Court of Appeals for the Fifth Circuit.

2. **The decision of the court of appeals**

The court of appeals properly affirmed the district court. The court of appeals analyzed the central issue in the Hospital Litigation: "Whether both cases involve the same cause of action." P.App. 5a. The court of appeals applied the "transaction test" of the Restatement (Second) of Judgments, which nearly every circuit has accepted as the analytical framework for determining whether the same cause of action was involved, and accepted the commonly held view that "the critical issue is not the relief requested or the theory asserted but whether [the] plaintiff bases the two actions on the same nucleus of operative facts." P.App. 5a. (quoting *Matter of Howe*, 913 F.2d 1138, 1144 (5th Cir. 1990)) (bracketed word added by court below).

Analyzing St. Jude Hospital's *res judicata* defense in the context of Louisiana partnership law, the court of appeals found that

> Louisiana recognizes a partnership as a separate entity; initially, a creditor of a partnership must bring suit against the partnership, but can join the parties in that action. *See* La. Code Civ. Proc. art. 737; *State v. Morales*, 256 La. 940, 240 So.2d 714, 716 n.3 (1970); *Falcon Drilling Co. L.P. v. Transamerica Energy, Ltd. II*, 622 So.2d 745, 747 (La. App. 3d Cir. 1993) (partner may be joined as a party defendant in the original action against the

> partnership). And, under Louisiana's entity theory of partnership, the creditor of a partnership should seek recovery first against the partnership. *See* La. Civ. Code art. 2817; *Koppers Co., Inc. v. Mackie Roofing & Sheet Metal Works*, 544 So.2d 25, 26 (La. App. 4th Cir. 1989) (intent of the law is that recovery be sought first against the primary debtor, the partnership); *see also Federal Deposit Ins. Corp. v. Mmahat*, 960 F.2d 1325, 1328-29 (5th Cir. 1992) (general discussion of actions against the partnership, including a partner's secondary liability), *cert. denied*, ___ U.S. ___ , 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993).

P.App. 5a-6a (footnotes omitted).

The court of appeals noted that St. Jude Hospital "conceded at oral argument that, had it not been a party in the Partnership Litigation, it would have no basis for claiming *res judicata*." P.App. 7a. Referencing St. Jude Hospital's undue focus on identity of parties, the court of appeals found "a distinction without a difference." P.App. 7a. "In essence, it [St. Jude Hospital] seeks to conflate the first (identical parties) and fourth (same cause of action) factors in our *res judicata* analysis." P.App. 7a-8a. The court of appeals found St. Jude Hospital's presence in the Partnership Litigation immaterial in light of Louisiana partnership law.

REASONS FOR DENYING THE PETITION

The legal issues presented by St, Jude Hospital's petition do not warrant the attention of the Court. Contrary to Petitioner's contentions, the court of appeals' decision does not conflict with any other circuit. The Tenth Circuit decision cited by Petitioner, *Lowell Staats Mining Co., Inc. v. Philadelphia Electric Co.*, 878 F.2d

1271 (10th Cir. 1989), is factually inapposite to this case. The court there applied the *res judicata* doctrine to bar a plaintiff's effort to hold a general partner liable for a debt of a putative partnership that had not been sued in the first proceeding. In this case, pursuant to the Louisiana law of partnership, Travelers instituted a collection suit against a general partner for the unsatisfied judgment owed by a partnership whose identity and liability had been established in the first suit. In the context of this Louisiana collection suit, St. Jude Hospital would have the Court elucidate a new doctrine of *res judicata* based on the formalistic, mechanical approach of nineteenth century jurisprudence long ago rejected by this Court. The stiff *res judicata* regime proposed by St. Jude Hospital would upset not only well-established notions of Louisiana partner liability but also the permissive joinder rules of the Federal Rules of Civil Procedure. For these reasons, which Travelers sets forth more fully below, the Court should deny the petition for a writ of certiorari.

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY OTHER COURT OF APPEALS AND WAS MANDATED BY LOUISIANA PARTNERSHIP LAW.

The court of appeals' decision does not conflict with the decision of the Tenth Circuit in *Lowell Staats Mining Co., Inc. v. Philadelphia Electric Co.*, 878 F.2d 1271 (10th Cir. 1989). That case is factually inapposite. Moreover, St. Jude Hospital's infatuation with the doctrine of *res judicata* has caused it to ignore that Louisiana partnership law serves as the foundation for the court of appeals' decision.

A. No Conflict Exists Between The Fifth Circuit's Decision In This Case And The Tenth Circuit's Decision In *Lowell Staats Mining*

St. Jude Hospital offers the Tenth Circuit's decision in *Lowell Staats Mining* to support its contention that the court of appeals' decision creates a conflict among the circuits. Petitioner argues that the Tenth Circuit in that case applied *res judicata* to bar a suit against a partner for the unsatisfied judgment of a partnership. St. Jude Hospital overlooks the fact that the *Lowell Staats Mining* plaintiff failed to establish in the first suit not only the existence of a partnership but also partnership liability. *Lowell Staats Mining* is factually inapposite. The Fifth Circuit and the Tenth Circuit have not collided over this issue.

In *Lowell Staats Mining*, the plaintiff, Staats, had sued and obtained a money judgment against Pioneer Uravan, Inc. ("PUI") for breach of a mining contract. Staats also sued in that action two other entities, Pioneer Corporation ("PC") and Pioneer Nuclear, Inc. ("PNI"), claiming that these corporations were responsible for PUI's liabilities under theories of alter ego, instrumentality, agency, successor corporation, and receipt of fraudulent conveyances. Importantly, Staats did not allege that any of the defendants constituted a partnership entity, and it did not seek to obtain a judgment against PUI, PC, or PNI on any theory of partnership liability. The trial court dismissed PC and PNI on a directed verdict, and the jury awarded Staats a money judgment against PUI. The Tenth Circuit affirmed the trial court's decision except as to prejudgment interest.

Staats' attempts to collect from PUI were unsuccessful, and it commenced a second suit against PC, PNI, and two other entities, Philadelphia Electric Company

("PEC") and Umetco Minerals Corporation ("UMC"). In this second action, Staats raised for the first time a new theory of liability—that PNI and PC, as partners of PUI in a putative partnership, were obligated to pay Staats' judgment against PUI.

The trial court dismissed the claims against PC, PNI, PEC, and Umetco. The trial court stressed that because the plaintiff-judgment creditor had failed to establish the existence of a partnership and to obtain a judgment against the alleged partnership in its primary capacity in the first action, *res judicata* barred it from obtaining a judgment against the alleged partnership and its partners based on that non-existent partnership debt:

> The [original] judgment was not recovered against one or more of several persons jointly indebted upon an obligation. PC and PNI were dismissed from the case, so Staats obtained a judgment against PUI only. Nothing in the [original] complaint or the [original] third-party complaint raised the specter that Staats was suing on a partnership debt or any other joint obligation involving third parties other than PC and PNI. Staats now raises that possibility for the first time [here]. As described elsewhere in this opinion, the attempt is barred by res judicata.

Lowell Staats Mining Co., Inc.v. Philadelphia Electric Co., 660 F. Supp. 809, 815 (D. Colo. 1987), *affirmed*, 878 F.2d 1271 (10th Cir. 1989).

The Tenth Circuit affirmed. Adopting the transactional approach of §24 of the Restatement (Second) of Judgments (1982) to determine what is a "cause of action," and noting Staats' failure to establish the existence and liability of the partnership entity in the first action, the Tenth Circuit stated

> Staats' partnership claims against PEC clearly arise out of the same "transaction" that was the basis of the litigation in [the first case]. In Colorado partners are jointly and severally liable for joint debts of the partnership. . . . Staats really does not dispute this but rather argues that by suing one defendant in [the first case], without alleging a partnership, he still retains his right to sue other alleged partners in a second, independent action. The cases relied upon by Staats, however, presuppose the alleged debt was identified in the first action as a partnership obligation.

878 F.2d at 1279 (citations omitted).

Lowell Staats Mining is factually distinct from this case. In the Partnership Litigation, Travelers named the partnership debtor in the original action and proved (1) the existence of the Partnership, (2) the identity of its sole general partner and (3) the liability of the Partnership. Indeed, St. Jude Hospital does not dispute in its petition for a writ of certiorari that Travelers established these facts in the Partnership Litigation. In contrast, although it could have, *Staats* made no allegations in the first suit of the existence of the putative partnership or the identity of its partners; it only adjudicated PUI's debt individually. Like Staats, Travelers knew of the partnership before trial. Unlike Staats, Travelers treated the debt not as an individual but as a partnership obligation and obtained a judgment against the partnership on that basis. 650 F. Supp. at 815. The parties in the Partnership Litigation, unlike the litigants in *Lowell Staats Mining*, understood that Travelers was suing on a partnership debt. *Id.* Travelers, unlike Staats, did not raise for the first time in this case the existence

of the partnership or of its debt. *Id. Lowell Staats Mining* does not contradict the holding of the court of appeals.[17]

B. Louisiana Partnership Law Entitled Travelers To Obtain A Judgment Against The Partnership Before Filing Suit Against St. Jude Hospital

Petitioner's rush to have this Court establish a fixed, inflexible doctrine of *res judicata* stampedes another, more established principle, federalism. St. Jude Hospital completely ignores the fact that, as a matter of state law in this diversity case, Travelers was entitled to obtain a judgment against the Partnership prior to instituting an action against St. Jude Hospital to collect on the Partnership's debt. St. Jude Hospital's discussion of *res judicata* notably omits any reference to this controlling authority.

As a matter of Louisiana law, Travelers was entitled to obtain a judgment against the Partnership before filing suit against St. Jude Hospital to compel payment of the Partnership's debt. The Louisiana Civil Code, the Louisiana Code of Civil Procedure, and the decisions of Louisiana federal and state courts definitively establish that a claimant may obtain a judgment against a partnership, and, should he be unable to collect from the partnership, file a second suit against its general partners. Although a claimant may elect to name the partnership and partners in a single suit, he is not required to do so. Indeed, even should a plaintiff file a single action, he may not

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[17] Although Petitioner ignored a discussion of the Colorado law of partnership in its petition, the Colorado law of partnership liability and civil procedural rules contemplate and authorize collection suits against partners subsequent to the original action establishing partnership liability. C.R.S.A. §13-50-105. *See, e.g., Resolution Trust Corp. v. Teem Partnership*, 835 F. Supp. 563 (D. Colo. 1993).

collect from the partners until the partnership assets are exhausted. *Res judicata* does not bar a second suit against partners.

The Louisiana Court of Appeal, Fourth Circuit, recently addressed these issues. In *Koppers Co., Inc. v. Mackie Roofing & Sheet Metal*, 544 So.2d 25 (La. App. 4th Cir. 1989), the court forcefully rejected defendants' claim of *res judicata* in an action seeking to hold partners liable for a judgment in a prior suit against a partnership. Although the partners were involved in the partnership's defense to the prior suit, there was neither a requirement to join the partners in that litigation nor any bar to pursuing them in a second and separate action. The Louisiana Fourth Circuit concluded as follows:

> Code of Civil Procedure Article 737 . . . is in accord with Civil Code Article 2817 which provides that "[a] partnership as principal obligor is primarily liable for its debts," and that the partner, who is secondarily liable, may plead discussion of the partnership assets. The clear intent of both articles is that a partnership creditor must first exhaust his rights against the partnership before he proceeds against the individual partners. However, there is no requirement that the partners be named as defendants in the suit against the partnership. Article 737 requires only the converse.
>
> Prior to filing the instant suit, [plaintiff] had already obtained a judgment against the partnership. Their present suit seeks redress against the individual partners for their virile share of the partnership debt. Although, as a practical matter, it may have been more economical and expedient to have joined the partners in the first suit, the intent of the law has been satisified in that recovery was first sought against the primary debtor, the partnership.

544 So.2d at 26.

Similarly, in *Stone v. Stone*, 293 So.2d 523 (La. App. 4th Cir. 1974), the Louisiana Fourth Circuit rejected a *res judicata* defense by a partner defendant who asserted that a plaintiff was required to name him as a defendant in the original suit. The Fourth Circuit noted that because the partner was only secondarily liable, he may be sued after the plaintiff attempts to enforce a judgment against the partnership. This was not only permissible but desirable because "[t]he individual partner's liability only comes into existence when and if the partnership becomes insolvent." 293 So.2d at 526.

The Fifth Circuit followed these state court decisions to find that an action against the partnership does not bar a subsequent collection suit against the partners. In *Federal Deposit Ins. Corp. v. Mmahat,* 960 F.2d 1325 (5th Cir. 1992), *cert. denied,* ___ U.S. ___ , 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993), the court of appeals recognized that a subsequent claim against a Louisiana partner was not barred by a previous judgment against the Louisiana partnership. Plaintiff, the Federal Deposit Insurance Corporation ("FDIC"), had filed suit against the partnership and one of its partners. FDIC did not name one of the general partners, Duffy; however, he was represented by counsel and actively participated in the suit as well as in settlement discussions. 960 F.2d at 1327. The original suit culminated in a judgment against the partnership and the other general partner. FDIC then sued Duffy for payment of his virile share of the judgment. Duffy argued that claims against him for his virile share should have been raised in the original suit in which he had participated and that the second suit was barred by *res judicata*. The district court sustained that objection and dismissed the case. On appeal, the Fifth Circuit reversed, concluding that, under Louisiana

law, a creditor must first exhaust his remedies against the partnership and only then pursue claims against the partners. The court of appeals decreed that, although a creditor may name the partnership and the partners in a single suit,

> [u]nder the Louisiana law of partnerships, each partner is secondarily liable for his virile share of the partnership debts. The fact that Duffy might have been joined in [the first suit] does not preclude the FDIC judgment against Duffy in a separate action. Since the [the first suit] resulted in a $35 million dollar judgment against Mmahat and M & D [the partnership], the FDIC is entitled to seek Duffy's share of the liability for the judgment.

960 F.2d at 1329 (citation omitted) (footnote omitted).

St. Jude Hospital argues that the decision of the court of appeals ignores this Court's precedent governing *res judicata*. Clearly, this is not the case. As a matter of Louisiana state law, Travelers was free to file a second suit after the Partnership failed to satisfy its debt to Travelers. And Louisiana is not unique.[18]

St. Jude Hospital's discussion of *res judicata* omits any reference to these pivotal Louisiana decisions, which have specifically concluded that a lawsuit against general partners following a final judgment against a partnership

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[18] Other states follow these rules of partner liability in the context of *res judicata* objections. *See, e.g., United States v. Ringley*, 750 F. Supp. 750, 756-7 (W.D. Va. 1990), *affirmed*, 985 F.2d 185 (4th Cir. 1993) (*per curiam*); *Block v. Woodbury*, 211 Ga. App. 184, 185-86, 438 S.E.2d 413, 415 (Ga. App. 1993); *Faber v. Althoff*, 168 Ariz. 213, 220-21, 812 P.2d 1031, 1038-39 (Ariz. App. 1990); *Brinkley, McNerney, Morgan & Solomon v. Community Acres Associates, Ltd.*, 602 Fo.2d 685, 687 (Fla. App. 1992); *Brunsoman v. Seltz*, 414 N.W.2d 547, 550-551 (Minn.App. 1987); *In re Jones*, 161 B.R. 181, 183 (Bankr.N.D.Tex. 1993).

is not barred by *res judicata.* This is telling. Petitioner's discussion also fails to address the fundamental difference in liability between a Louisiana partnership and its partners for debts of the partnership – a distinction that is fatal to St. Jude Hospital's claim of *res judicata.*

The Partnership is organized under the laws of the State of Louisiana. Under Louisiana law, a partnership is a distinct legal entity with the right to sue or be sued in its own name. A partnership may incur debts in its own name, and it is primarily liable for the payment of those debts. The partners are secondarily liable for those debts, but they may not be compelled to pay the partnership's debts until the partnership is liquidated or its assets are exhausted. 544 So.2d at 26. Indeed, under Louisiana Civil Code article 2817, a partner sued for a partnership debt is entitled to plead discussion and compel the partnership creditor to exhaust his remedies against the partnership before he proceeds against the partner. The revised comments to article 2817 state this:

> This article sets forth the rule that creditors must look to the partnership first for the debts of the partnership. The partners are only secondarily liable . . . A third person may sue the partnership and the partners at the same time . . . but can recover against a partner who has properly pleaded discussion only if the partnership's assets have been exhausted or the partnership has been dissolved.

Comment to La. Civ. Code art. 2817.

That is precisely what has occurred in this case. Travelers obtained a judgment against the Partnership, sought to execute that judgment and only then filed suit against the general partner, having determined the Partnership could not satisfy its debts.

II.

THIS COURT SHOULD NOT RETREAT TO THE MECHANICAL RULES ADVOCATED BY PETITIONER AND INTERVENE IN THIS LOUISIANA COLLECTION SUIT.

St. Jude Hospital petitions the Court for "clarification" of the doctrine of *res judicata* and, presumably, reversal of the judgment of the court of appeals. St. Jude Hospital argues that the doctrine is not clear and focuses on the lower courts' supposed misplaced reliance on the transactional test espoused by Section 24 of the Restatement (Second) of Judgments (the "Restatement"). St. Jude Hospital argues that the pragmatic considerations inherent in that analysis have aggravated this lack of clarity concerning the application of the *res judicata* doctrine. These contentions are without support. The *res judicata* doctrine is by its very nature abstract. It warrants the flexible standards espoused by the Restatement and adopted by nearly every Circuit. The Court should not retreat to the anachronistic, formalistic rules espoused by St. Jude Hospital.

The *res judicata* jurisprudence of this Court is well-developed. "There is little to be added to the doctrine of *res judicata* as developed in the case law of this court." *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981). *Res judicata* ensures the finality of decisions. Under that doctrine, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States,* 440 U.S. 147, 153 (1979). "*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that was previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen,* 442 U.S. 127, 131 (1979).

Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes. *Id.* However, "*res judicata* shields the fraud and the cheat as well as the honest person. There it is to be invoked only after careful inquiry." *Id.*

Notwithstanding the doctrine's abstract nature and the practicalities of modern litigation, Petitioner would have this Court elucidate a set of rules to govern *res judicata* focused exclusively on claims or issues that "could have been raised." This inquiry ignores *res judicata's* abstract nature and the practical needs of parties in modern complex litigation. A leading commentator reflected on these often conflicting realities:

> As an abstract matter, res judicata doctine presents a particularly delicate balance between the values of clear theory and the need for pragmatic adjustment. On the one hand, clear rules provide important benefits. Res judicata principles as a whole respond to the perception that "[a] lawsuit is not a laboratory experiment for the discovery of physical laws of universal application but a means of settling a dispute between litigants." Clear rules are important if a dispute is to be settled by a single litigation. The clearer the rules, the better the parties are able to rely on the judgment, to measure a sense of repose against it, and to avoid repetitive litigation that tests its limits. On the other hand, many of the abstract rules must be informed by a wise sense of real-world affairs and a healthy skepticism about the capacities of any single litigation to settle the relationships beyond the immediate dispute. Rules that control the matters that must be advanced in the first suit or lost, for example, must take account of the practical needs of the parties and the burdens and distortions entailed by complex litigation . . . .

> One result of this balance between theory and practice is that many rules must be expressed in general terms that identify the purposes and values of preclusion, but do not clearly dictate answers to particular questions.

18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* §4401, at 3-4 (1981) (footnote omitted).

Uncertainty concerning the application and explanation of the rules of *res judicata* has thus proved unavoidable. *Id.*, §4407 at 49.[19] Despite this uncertain nature, Petitioner would have this Court espouse nineteenth-century black letter precepts of *res judicata.* As one commentator explained, "[c]lassically, as propounded in such seminal 19th-century cases as *Cromwell v. County of Sac* [94 U.S. 351 (1876)], *res judicata* was a doctrine of finality expressed and implemented through a cluster of axiomatic rules of law specific in form, absolute in force, and mandatory in application." Maurice J. Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine,* 55 Ind. L.J. 615, 616 (1980) (footnote omitted). "In the matter of the formal or . . . 'mechanical' jurisprudence of the late nineteenth century, the rules of res judicata were thought to embody in themselves every consideration of fairness or justice which judges were entitled to take into account." *Id.* at 617.

The Restatement, in contrast, ushered a marked departure from these mechanical notions. The Restatement assisted in the transition from the formalistic jurisprudence of the late nineteenth and early twentieth cen-

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[19] *See also,* 1B James W. Moore, Jo Desha Lucas & Thomas S. Currier, *Moore's Federal Practice,* ¶0.405[5], at III-12 (2d Ed. 1994) ("The doctrine of res judicata is not a technical rule, but a rule of fundamental repose for both society and litigants").

turies to a more flexible and equitable modern doctrine of *res judicata*. Professor Holland has noted this shift from unyielding application of black-letter rules to the multifaceted analysis and balancing of competing interests contemplated by the Restatement:

> In recent decades, there seems to have developed a *nearly universal agreement* among judges and scholarly commentators alike that res judicata cannot be soundly administered by means of resolute adherence to a battery of self-enclosed rules of the kind so confidently pronounced by Justice Field in *Cromwell v. County of Sac* as constituting the sole and sufficient grounds of decision in cases involving the preclusive effect of judgments.

Id. at 618 (footnote omitted) (italics added).

The Restatement embodies this modern, multifaceted analysis. Section 24 of the Restatement provides a pragmatic test for analyzing the phrase "cause of action." The purpose of Section 24 was to move away from the "primary right" theory of claim preclusion espoused by the Petitioner, which focuses on the claims that might arise from a transaction, to the more pragmatic "transactional" theory. The transactional theory views the "claim in factual terms and [makes] it coterminous with the transaction regardless of the number of substantive theories . . . that may be available to the plaintiff." Restatement, §24(2), comment a. Section 24(2) implements the goal of Section 24(1), which is to prevent a plaintiff from "splitting" claims by defining the application of the rules of *res judicata* in terms of the transaction out of which the claims arose. Section 24(1) prevents the splitting of claims concerning "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transactions, or a series

of connected transactions out of which the action arose." Restatement, §24(1).

Disclaiming the possibility of a "mathematically precise definition," Section 24(2) does not attempt to define a "transaction." A "transaction" invokes a "pragmatic standard to be applied with attention of the facts of cases." Restatement, §24(2), comment b. The comments confirm that what constitutes a transaction must be decided pragmatically with a focus on a "natural grouping or common nucleus of operative facts." *Id.*

Intervention is clearly not needed here. Nearly every Circuit follows the transactional test espoused by the Restatement.[20] That test is the product of the transition from the black letter, formalistic, and inequitable rules of the past to modern notions of flexibility, balance, and fairness. "Definitions of what constitutes the 'same cause of action' have not remained static over time." *Nevada v. United States,* 463 U.S. 110, 129 (1983). Contrary to St. Jude Hospital's fixation on a discrete element of the *res judicata* doctrine,[21] the

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[20] *See, e.g., U.S. Industries, Inc. v. Blake Constr. Co.,* 765 F.2d 195 (D.C. Cir. 1985); *Manego v. Orleans Board of Trade,* 773 F.2d 1 (1st Cir. 1985), *cert. denied,* 475 U.S. 1084 (1986); *Collard v. Incorporated Village of Flower Hill,* 759 F.2d 205 (2d Cir.), *cert. denied,* 474 U.S. 827 (1985); *Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc.,* 892 F.2d 355 (4th Cir. 1989), *cert. denied,* 497 U.S. 1005 (1990); *Corpus Christi Taxpayers' Association v. City of Corpus Christi,* 858 F.2d 973 (5th Cir. 1988), *cert. denied,* 490 U.S. 1065 (1989); *Shaver v. F.W. Woolworth Co.,* 840 F.2d 1361 (7th Cir.), *cert. denied,* 488 U.S. 856 (1988); *Lane v. Peterson,* 899 F.2d 737 (8th Cir.), *cert. denied,* 498 U.S. 823 (1990); *C.D. Anderson & Co. v. Lemos,* 832 F.2d 1097 (9th Cir. 1987); *Lowell Staats Mining Co., supra.*

[21] It is ironic that St. Jude Hospital repeatedly cites the need to avoid multiple proceedings in support of its argument for a mechanistic application of *res judicata.* The actions of St. Jude

[footnote continued]

Restatement provides the courts of appeal with the flexibility needed to address the maze of factual scenarios encountered by modern courts. Certiorari review on this issue is not needed.

III.

THE FORMALISTIC APPROACH ADVOCATED BY PETITIONER WOULD UNDERMINE THE PERMISSIVE RULES GOVERNING JOINDER OF CLAIMS.

By focusing on the "could-have-been-raised" aspect of the *res judicata* doctrine and its attenuated relevance to Federal Rule of Civil Procedure 13(a) compulsory counterclaims, St. Jude Hospital would have the Court gut the permissive joinder rule of Federal Rule of Civil Procedure 18(a). That rule states this:

> A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

Rule 18(a) allows the joinder in a single suit of all claims existing between litigants. It is permissive, and the failure to join a claim does not necessarily bar its assertion in a subsequent action. 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* §1582, at 524 (2d ed. 1990).

Hospital and its affiliates, described by one Fifth Circuit panel as involving "as egregious and unconscionable course of bad faith contractual dealings as the members of this panel can recall having encountered," has spawned four separate civil actions, two Chapter 11 proceedings and six collateral actions challenging Travelers' several judgments. *See, e.g., Travelers Ins. Co. v. St. Jude Hospital of Kenner, La., Inc.*, 37 F.3d 193, 194 n.3 (5th Cir. 1994). Indeed, the Fifth Circuit has repeatedly commented on the "continuing" litigation marked by St. Jude Hospital and its affiliates' repeated, belated and "extremely intemperate" pleadings. *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.2d 1404, 1405 (5th Cir. 1994).

Rule 18(a) is merely a procedural device intended to promote judicial economy, prevent multiple lawsuits, and expedite the final determination of disputes. *See, e.g., Leimer v. Woods,* 196 F.2d 828, 833 (8th Cir. 1952). Joinder of claims under Rule 18(a) is not compulsory, and courts have taken care not to allow it to deprive litigants of substantive rights. "Rule 18 merely permits the joinder of other claims against the same party, but, faced with a very real controversy, the pleader, to flee from res judicata, need not dream up all imaginable disputes with the adversary dependent on the outcome of the then controversy and as to which predictions on consequential impact would involve theorizing on hypotheticals." *Dore v. Kleppe,* 522 F.2d 1369, 1374-75 (5th Cir. 1975), *rehearing denied,* 526 F.2d 697 (1976).

The United States Court of Appeals for the Eighth Circuit long ago emphasized the permissive policy behind Rule 18(a):

> [The] joinder of causes of action in federal practice has its source in Rule 18(a) . . . which permits and encourages the practice but does not compel it. This optional nature, coupled with the unilateralness of its right of exercise, could hardly soundly, without some unmistakable indication, be regarded as intended to affect in any substantive respect the rights of an adverse party as they would exist without the joinder. In other words, the Rule simply affords a vehicle for convenience, facilitation and economy in litigation procedurally, and it does not have as its object to put it within the power of one party or the court thereby to produce a substantive impingement upon any right or liability.

196 F.2d at 833.

Under the formalistic *res judicata* regime proposed by St. Jude Hospital, permissive joinder of claims would cease to exist. Every claim that "could have been raised" will be raised, and the permissive notions underlying Rule 18(a) would be undercut under Petitioner's fixed, formalistic approach to pleading. Indeed, St. Jude Hospital's inflexible understanding of *res judicata* would have the opposite effect intended by Petitioner: Rather than encourage the expedited resolution of *multiple* claims in a single proceeding, the "could have" approach to *res judicata* would instead *multiply* the claims asserted, as each litigant dreams up and pleads as many claims as possible to prevent the heavy-handed preclusive effect and application of St. Jude Hospital's *res judicata* doctrine. 522 F.2d at 1374-75. That is not the public policy behind Federal Rules of Civil Procedure 18(a). Travelers urges the Court to deny the petition.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

RELEVANT STATUTORY PROVISIONS

Louisiana Code of Civil Procedure Article 737

A partnership has the procedural capacity to be sued in its partnership name.

The partners of an existing partnership may not be sued on a partnership obligation unless the partnership is joined as a defendant.

Louisiana Civil Code Article 2817

A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the assets of the partnership.

C.R.S.A. §13-50-105

A partnership or other unincorporated association may sue or be sued in an action in its common name to enforce for or against it a substantive right; except that in such action only the property of the partnership or other unincorporated association, the joint property of the associates, and the separate property of any individual member thereof who is named as a party individually and over whom individually the court has acquired jurisdiction either by entry of appearance or by service of process may be bound by the judgment therein.

Federal Rule of Civil Procedure 18(a)

A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.